THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 61 Date: 2013-06-11

Between: Docket: CACV2014

The Saskatchewan Federation of Labour, The Saskatchewan Government and General Employee's Union, and The Saskatchewan Joint Board Retail, Wholesale and Department Store Union

Appellants

- and -

The Government of Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour) and The Saskatchewan Labour Relations Board

Respondents

Coram:
Cameron, Caldwell and Herauf JJ.A.
Counsel:
S. Ronald Ellis Q.C. and Larry Kowalchuk for the Appellants
Thomson Irvine for the Respondent
Appeal:

From:	2010 SKQB 390
Heard	February 14, 2013
Disposition:	Appeal Dismissed
Written Reasons:	June 11, 2013
By:	The Honourable Mr. Justice Cameron
In Concurrence:	The Honourable Mr. Justice Caldwell
	The Honourable Mr. Justice Herauf

CAMERON J.A.

I. Introduction

[1] Following the Saskatchewan general election held on November 7, 2007, which saw a change of government, the Lieutenant Governor in Council made an order-in-council terminating the appointments of the then chairperson and vice-chairpersons of the Saskatchewan Labour Relations Board and appointing a new chairperson.

[2] The order-in-council terminating these appointments was made on the authority of section 20 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2. This section empowers the Lieutenant Governor in Council, on a change of government, to bring to an end the term of office of any member of any board, commission, agency, or other appointed body of the Government of Saskatchewan. There is an exception in the case of persons whose appointments are subject to termination by the Legislative Assembly, but the exception does not apply to members of the Labour Relations Board.

[3] Shortly after the order-in-council was made, the Saskatchewan Federation of Labour and two unions, namely the Saskatchewan Joint Board Retail, Wholesale and Department Store Union and the Canadian Union of Public Employees, applied to the Court of Queen's Bench for a declaration declaring the order-in-council void. They contended it was void because the Lieutenant Governor in Council lacked the power to make it, or had made it

for an impermissible purpose or improper motive. The Court of Queen's Bench disagreed and dismissed their application.

[4] They then appealed to this Court. It dismissed their appeal on the two-fold ground the Lieutenant Governor in Council (i) was empowered by section 20 of *The Interpretation Act, 1995* to make the impugned order-in-council and (ii) did not abuse that power in making the order for the impermissible purpose or improper motive of influencing the decisions of the Board and undercutting its independence.[1]

[5] Immediately after the dismissal of their appeal, the Saskatchewan Federation of Labour and the Saskatchewan Joint Board Retail, Wholesale and Department Store Union made a second application to the Court of Queen's Bench to have the order-in-council declared void. They were joined on this occasion by the Saskatchewan Government and General Employee's Union. This time they contended the order-in-council was void on the ground section 20 of *The Interpretation Act, 1995* is unconstitutional to the extent it empowers the Lieutenant Governor in Council to terminate the fixed terms of office of the chairperson and vice-chairpersons of the Labour Relations Board.

[6] It is unconstitutional, they said, because it is inconsistent with the "unwritten constitutional principle of judicial independence" secured by the *Constitution Act, 1867*. In their submission this principle, which applies to the Provincial Court in its capacity as an inferior court of civil jurisdiction and

[1] *Saskatchewan Federation of Labour et al v. Saskatchewan (Attorney General)*, 2010 SKCA 27.

protects its judges from arbitrary removal from office, also applies to persons such as the chairperson and vice-chairpersons of the Labour Relations Board and, therefore, protects these persons from like treatment. It does so, according to the submission, because there is no meaningful distinction between the adjudicative function of these two institutions in the realm of the civil law.

[7] The second application came before Mr. Justice Ball. He dismissed it on the basis this principle of judicial independence, while arguably applicable to administrative tribunals whose principal function is to adjudicate disputes in much the same way the courts do, does not apply to the chairperson and vice-chairpersons of the Labour Relations Board. He was of the opinion it does not extend to them because the function of the Board is essentially and mainly *administrative* rather than *judicial*.

[8] More particularly, he was of the opinion that the function of the Board, while extending to the adjudication of labour-management disputes, remained essentially administrative rather than judicial because the Board's primary function was to formulate and implement public policy, particularly in relation to (i) regulating trade union representation in the workplace and (ii) supervising collective bargaining. Hence, he concluded that section 20 of *The Interpretation Act, 1995,* as it applies to the chairperson and vice-chairpersons of the Board, is not unconstitutional. His decision may be found at 2010 SKQB 390.

[9] At that, the Federation of Labour and the two unions brought this appeal. They contended Justice Ball erred in declining to recognize that the chairperson and vice-chairpersons of the Labour Relations Board adjudicate disputes in the field of labour relations in essentially the same way judges of the Provincial Court adjudicate disputes in the field of civil law generally. The Government of Saskatchewan contended otherwise, saying there is a meaningful distinction between the role of the Board, as an administrative tribunal, and the role of the Provincial Court, as a court of law. The Government also contended that the application by the Federation of Labour and the two unions to have the order-in-council declared void, being the second application of its kind, amounted to an abuse of process and should have been dismissed on that basis.

II. The Underlay of Fact and Law

1. The Impugned Order-in-Council

[10] The Lieutenant Governor in Council made the order-in-council on March 6, 2008. This was four months after the Saskatchewan general election of November 7, 2007. The election resulted in the resignation of the existing government led by Premier Lorne Calvert, the leader of the New Democratic Party, and the installation of a new government led by Premier Brad Wall, the leader of the Saskatchewan Party.

[11] The order served to (i) terminate the terms of office of the then chairperson and vice-chairpersons of the Board; (ii) appoint a new

chairperson for a term of five years; and (iii) increase the remuneration of the chairperson from $120,000 per year to $180,000 per year.

[12] Premier Wall explained the reason behind the move. The central thrust of his explanation was this: The new government, consistent with the position taken by the Saskatchewan Party before and during the election, had introduced or was about to introduce significant changes to Saskatchewan's labour relations legislation and considered it desirable, therefore, to appoint a new chairperson to ensure the new legislation would be interpreted and applied in keeping with the policy choices reflected in the changes.[2] In short, the government saw the matter as one of confidence in the Board to further these policy choices in accordance with their intent.

[13] The former chairperson, it might be noted, had been appointed at the instance of the former government. That was on August 14, 2007, or three months before the election. He was appointed to hold office for a term ending on October 1, 2008. The two vice-chairpersons had been appointed at the instance of the former government on the same day. But they were appointed to hold office for longer terms—terms expiring on July 1, 2009, in the case of the one, and on May 16, 2012, in the case of the other. Shortly before the election, then, these persons were appointed for terms of office approximating one year in the case of the first, two years in the case of the second, and five years in the case of the third.

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[2] For a more extensive account of what the Premier said of the matter, see *Saskatchewan Federation of Labour et al* v. *Saskatchewan (Attorney General), supra.*

[14] Contemporaneous with these appointments, several other persons, eighteen in all, had been appointed by the former government as members of the Board. They were appointed to hold office for various terms not exceeding three years. Half were appointed as members "representing employees" and half as "representing employers". Their appointments were unaffected by the impugned order-in-council, which served only to bring an end to the terms of office of each of the chairperson and the two vice-chairpersons.

[15] Such are the political realities when it comes to the appointment of the members of the Saskatchewan Labour Relations Board, including the chairperson and vice-chairpersons, and to the replacement of the latter when, as a result of a general election, one government resigns and another takes its place. This is not said pejoratively, for the political reality comports with the law as enacted by the elected representatives of the people of the Province.

[16] It also comports with long standing practice borne of a desire by successive Saskatchewan governments to ensure that their policy choices in the often contentious field of labour relations are realized in accordance with the intent of the legislation embodying those choices. These choices may on occasion be weighted in one way or another, having regard for the particular mix of social and economic policy considerations they reflect. Hence, they are seldom free of controversy, as they were in this instance.

2. The Statutory Authority for the Order-in-Council

[17] The Lieutenant Governor in Council made the order-in-council (O.C.

98/2008) on the combined authority of section 20 of *The Interpretation Act, 1995* and section 4 of *The Trade Union Act*, R.S.S. 1978, c. T-17.

(1) Section 20 of *The Interpretation Act, 1995*

[18] As mentioned at the outset, the terms of office of the then chairperson and vice-chairpersons of the Labour Relations Board were terminated pursuant to this section of this *Act*. The section reads thus:

> 20(1) Subject to subsection (2), notwithstanding any other enactment or any agreement, if a person is a member of a board, commission or other appointed body of the Government of Saskatchewan or any of its agencies or Crown Corporations on the day on which the Executive Council is first installed following a general election as defined in *The Election Act*, the term of office for which that person was appointed is deemed to end on the earlier of:
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> (a) the last day of the term for which that person was appointed; or
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> (b) a day designated by the Lieutenant Governor in Council or the person who made the appointment.
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> (2) Subsection (1) does not apply to a person whose appointment is expressly stated in an Act to be subject to termination by the Legislative Assembly

[19] This Court, in its reasons for judgment in the first of the two cases to come before it regarding the validity of O.C. 98/2008, remarked upon the scope and purpose of this section, saying this of the matter:

> [53] The scope of the section is extraordinary but clear. Expressed to apply "notwithstanding any other enactment", the section extends to every board, commission, agency, and other appointed body of the Government of Saskatchewan. It also extends to every person who, having been appointed a member by the Lieutenant Governor in Council or a minister, is a member on the day a new government comes to power.
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> [54] The only exception is a person whose appointment is expressly stated in an *Act* to be subject to termination by the Legislative Assembly. One such person is the provincial auditor, who can only be removed from office by resolution of the

> Assembly. Another is the ombudsman, who can only be removed on resolution of the Assembly.
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> [55] The purpose of section 20 is equally clear. The surest and most informative identification of its purpose lies in the remarks of the Attorney General who introduced the bill that ultimately led to the enactment of the section. He introduced the bill shortly after a new government had come to power in 1982. In speaking to the bill before the Legislative Assembly during second reading on July 5th, 1982, he said this of the purpose of the section:
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> > Mr. Speaker, the purpose of the amendment is quite clear. When any new government is elected, it cannot have its hands tied by the previous government's actions. This amendment will assist any new government ... to move to implement its policies through its various boards, commissions, and agencies, by changing memberships on those bodies as is necessary.

[20] As the Attorney General of the day noted, section 20 only applies upon a change of government following a general election. In other words it only applies when, given the results of a general election, (i) the then members of the Executive Council, including the Premier, resign from office because they can no longer count on the support of a majority of the members of the Legislative Assembly, and (ii) others, including a new Premier, are appointed in their stead on the understanding they can count on such support.

[21] This, then, is the statutory authority pursuant to which the terms of office of the former chairperson and vice-chairpersons were brought to an end.

(2) Section 4 of *The Trade Union Act*

[22] The remaining portions of O.C. 98/2008 (appointing a new chairperson and fixing his remuneration) were made on the authority of this section of this

Act. The section provides as follows:

> 4(1) There shall continue to be a board known as the Labour Relations Board composed of members appointed by the Lieutenant Governor in Council at such salaries and or remuneration as he deems fit; the Lieutenant Governor in Council shall name a chairperson and not more than two vice-chairpersons of the board; the members of the board shall be selected so that employers and organized employees are equally represented.
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> (1.1) The members of the board:
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> (a) shall be appointed to hold office for terms not exceeding:
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> (i) five years in the case of the chairperson and vice-chairpersons; and
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> (ii) three years in the case of other members; and
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> (b) may be reappointed for additional terms.

[23] These provisions were considered by this Court in the first of the two cases to come before it regarding the validity of O.C. 98/2008. The Court considered them from the perspective of the independence of the chairperson and vice-chairpersons of the Labour Relations Board as an administrative tribunal whose function consists in large part of the adjudication of labour-management disputes in much the same way as the courts adjudicate more varied and broadly based disputes. The Court held that these provisions, construed in this context, were intended by the Legislature to confer upon these persons a significant measure of independence, including independence from the executive branch of government.

[24] That said, I think it worth elaborating upon this in the context of these and other provisions of *The Trade Union Act*.

III. The Independence of the Chairperson and Vice-Chairpersons

[25] In the first of these two cases, the Court noted that to speak of the independence of these persons is to speak in general of their capacity, during their terms in office, to exercise their adjudicative powers impartially and free of outside interference, particularly from the executive branch of government. The point found practical illustration in the fact the government is an employer within the meaning of *The Trade Union Act* and, therefore, appears before the Board from time to time as a party to labour-management disputes. The Court also noted that adjudicative independence entails a measure of security of tenure, financial stability, and administrative freedom in relation to the exercise by these persons of their adjudicative duties.

[26] The Court went on to find that section 4 of *The Trade Union Act,* properly construed, served to confer upon the chairperson and vice-chairpersons a meaningful measure of security of tenure and financial stability. The section provides for the appointment of these persons by the Lieutenant Governor in Council to hold office for terms not exceeding five years at such salaries or other remuneration as the Lieutenant Governor deems fit. The Court held that these provisions contemplate the appointment of a chairperson and vice-chairpersons for “fixed terms of office” rather than “at pleasure”.

[27] That being so, the Court held that the Lieutenant Governor in Council is unable in the ordinary course to terminate the appointment of these persons except for “cause”, meaning their terms of office cannot be brought to an end

arbitrarily or for no reasons other than the displeasure of the Executive Council or cabinet. Otherwise, the ability of the Labour Relations Board to perform its adjudicative function at arm's length from the executive branch of government, as implicitly intended by *The Trade Union Act*, would be seriously compromised. Based on this same reasoning, it may be supposed that the Lieutenant Governor in Council is unable in the ordinary course to reduce the salary of the chairperson or vice-chairpersons as fixed by order-in-council at the time of their appointments. Were it otherwise, the Board's ability to perform its adjudicative function at arm's length from the government would be similarly compromised.

[28] This ability of the Board finds further expression in those provisions of *The Trade Union Act* affording the Board administrative freedom in relation to the discharge of its adjudicative duties. Subsection 4(11), for example, provides for the appointment by the Lieutenant Governor in Council of "an executive officer" of the Board "who shall be an agent of the board and shall perform such duties as the board may from time to time direct." Subsection 4(12) goes on to make it clear that the executive officer is answerable to the Board and only the Board.

[29] The significance of this is that it is the Board, acting through the executive officer and the chairperson or vice-chairpersons, that manages the business associated with the hearings of the Board, including scheduling, empanelling, and so on. The member of the Executive Council to whom the administration of *The Trade Union Act* is assigned has nothing to do with this. Thus, the Board, acting through these persons, is the master of its own

proceedings in this and other respects, meaning these persons are empowered to act independently and impartially in this regard, without interference by anyone, including the executive branch of government.

[30] The impartiality of the chairperson and vice-chairpersons is further secured by section 4(10) of *The Trade Union Act,* which requires these persons (in common with all members of the Board) to take an oath of fidelity and impartiality upon appointment.

[31] It might also be noted that section 18.1 of *The Trade Union Act* confers upon the chairperson and vice-chairpersons of the Board (in common with all members of the Board), the same privileges and immunities as those enjoyed by judges of the Court of Queen's Bench. These immunities, long regarded as central to adjudicative independence, encompass immunity from civil suit, for example, in relation to the discharge of the adjudicative function.

[32] On the whole, then, the foregoing provisions of *The Trade Union Act* serve to confer a significant measure of independence and impartiality in the Board, including its chairperson and vice-chairpersons. The *Act*, however, is not the sole source of the measure of independence and impartiality expected of the Board.

[33] There is also the common law, and its doctrines of "natural justice" and "procedural fairness". Put simply, these doctrines, which may be conveniently referred to as the principle of natural justice, require the Board, in the exercise

of its adjudicative powers, to so conduct itself as to ensure a fair hearing by an impartial and independent decision-maker.

[34] This, too, was remarked upon by this Court in the first of these two cases. The Court there noted that the Board is bound by the common law principle of natural justice and, therefore, bound by the degree of independence and impartiality this principle requires of the Board:

> [46] … This is especially significant when it comes to the chairperson because this person: (i) stands apart from the requirement that members of the Board be selected so that employers and employees are equally represented; (ii) must be present to form a quorum; and (iii) possesses a casting vote in the event of a tie. This is also true of a vice-chairperson when acting in place of the chairperson.

[35] These persons are thus bound, as is the Board, to adjudicate labour-management disputes impartially without interference from anyone, including any member of the government, or any employer, union, or other person for that matter. And their decisions are reviewable by no one but the superior courts in the exercise of the supervisory powers of these courts to ensure the Board exercises its adjudicative powers reasonably and impartially.

[36] All of the foregoing flows, of course, from the combined authority of *The Trade Union Act* and the common law principle of natural justice. Hence, it is open to the Legislature, absent constitutional constraints, to provide otherwise, for it is the Legislature that determines the degree of independence of every administrative tribunal it creates, assuming, that is, that there is no constitutional impediment standing in its way: *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781.

[37] Thus, in the first of the two cases to come before it, this Court held that it was open to the Legislature to reduce the measure of independence enjoyed by the Labour Relations Board, including that of the chairperson and vice-chairpersons, by empowering the Lieutenant Governor in Council, in section 20 of *The Interpretation Act, 1995*, to terminate the appointments of these persons in the event of a change of government within the contemplation of section 20.

[38] That being said, it may not have been open to the Legislature to have done so should the constitutional principle of judicial independence extend to the chairperson and vice-chairpersons of the Board. This was not determined in the earlier case because on that occasion the matter was not placed in issue, either in the Court of Queen's Bench or in this Court.

[39] That, then, brings us to the constitutional principle of judicial independence, including the unwritten constitutional principle relied upon by the Federation of Labour and the two unions in contending that, to the extent section 20 of *The Interpretation Act, 1995* applies to the chairperson and vice-chairpersons of the Board, the section is unconstitutional because it is inconsistent with this unwritten principle.

IV. **The Constitutional Principle of Judicial Independence.**

[40] Judicial independence generally means the capacity of the courts to function without actual or apparent interference by anyone, including in particular the legislative and executive branches of government. As this

applies to the conditions under which judges serve, the hallmarks or essential conditions of judicial independence are three-fold: (i) security of tenure, (ii) financial stability, and (iii) administrative freedom in relation to the exercise of their judicial duties: *Valente* v. *The Queen*, [1985] 2 S.C.R. 673. As explained in *Valente,* at p. 685, these indicia have to do with "a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees." Thus, judicial independence has both personal and institutional aspects.

[41] As also explained in *Valente*, at p. 685, judicial independence is intrinsically linked to the concept of impartiality, which is to say with "the state of mind or attitude" of the judge regarding the issues and the parties in a particular case—a state of mind prompting judges to perform their judicial duties without fear or favour from any quarter, as the saying goes, including the legislative and executive branches of government. Indeed, it has been said that judicial independence is the means to the end of impartiality. "Independence is the cornerstone, a necessary prerequisite, for judicial impartiality": Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114 at p. 139.

[42] All of this, of course, has more to do with nature of judicial independence than the bases upon which it rests and the purposes it serves. The latter were summed up as follows by Major J., who delivered the judgment of the Supreme Court of Canada in *Ell* v. *Alberta,* 2003 SCC 35, [2003] 1 SCR 857:

> [22] In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The

> judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference, supra* [[1997] 3 S.C.R. 3], at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard, supra* [[1986] 2 S.C.R. 56], at p. 70:
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> > Courts act as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.
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> This constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.
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> [23] Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin* v. *New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13 at para. 38, *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception.

[43] Viewed in this light, the business of judicial independence may be seen to be of fundamental significance to the relationship between the executive and legislative branches of government, on the one hand, and the judicial branch, on the other. Hence, judicial independence is secured by the Canadian Constitution, most notably by the *Constitution Act, 1867* and the *Constitution Act, 1982,* including the *Canadian Charter of Rights and Freedoms.* In one way or another (though in quite different ways), these components of the Constitution secure the judicial independence of all Canadian courts.

[44] As for provincial courts whose judges are appointed by the provincial governments, their judicial independence (when exercising civil law jurisdiction in contradistinction to criminal law jurisdiction), is constitutionally secured by the preamble to the *Constitution Act, 1867*, which refers to a "Constitution similar in principle to that of the United Kingdom": *Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. In light of its source, the constitutional security thus afforded these courts has become known as "the unwritten constitutional principle of judicial independence".

[45] It is this principle that protects the independence of the Provincial Court and its judges, including the security of tenure of the judges (and thus their immunity from arbitrary removal from office), as well as their financial stability and administrative freedom in the discharge of their judicial duties in the realm of the civil law. And it is this principle that is in issue here.

[46] To be sure, there is more to the principle of judicial independence than this, and more to its constitutional entrenchment. But this sketch will do for the purpose of addressing the question to which the appeal has given rise.

V. The Question and its Analysis

[47] The question, of course, is whether the unwritten constitutional principle of judicial independence extends to the chairperson and vice-chairpersons of the Labour Relations Board so as to have precluded the

Lieutenant Governor in Council from validly terminating their terms of office on the authority of 20 of *The Interpretation Act, 1995*.

[48] The analysis of the question is heavily driven by the decision of the Supreme Court of Canada in *Ocean Port Hotel Ltd*. v. *British Columbia (General Manager, Liquor Control and Licensing Branch* (cited above).

[49] *Ocean Port* concerned the adequacy of the independence of the British Columbia Liquor Appeal Board and its members, given the Board's statutory power to conduct hearings into alleged infractions by holders of provincial liquor licences, make findings of guilt, and impose penalties. The members of the Board were appointed by the Lieutenant Governor in Council to serve at pleasure on a part-time basis for a period of one year. All but the chair were paid on a *per diem* basis. The chair was empowered to establish panels of varying size to conduct the hearings, and to appoint one member of the panel to preside. In light of this, and the nature of the power conferred on the Board, the issue was whether, having regard for the common law principle of natural justice or the constitutional principle of judicial independence, the Board lacked the necessary guarantees of independence required of an administrative tribunal so empowered.

[50] The Supreme Court held that there was no basis, either in common law or in constitutional law, to require a greater degree of independence in the Board than that conferred upon the Board by its enabling legislation. In so holding, the Court observed that the degree of independence required of a particular government decision-maker or tribunal is determined by its

enabling statute, for as a matter of principle it is for the legislature or Parliament, absent constitutional constraints, to determine the degree of independence of tribunal members. Writing on behalf of the Court, Chief Justice McLachlin said this of the matter:

> [23] This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges—both in fact and perception—by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, [[1996] 3 S.C.R. 919] at para. 61.
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> [24] Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[51] These passages plainly contain expressions of principle of general application and, therefore, suggest that in light of the fundamental distinction between courts and administrative tribunals, (including administrative tribunals empowered to make quasi-judicial decisions), the independence of the courts is constitutionally secured, whereas that of administrative tribunals is not—not unless the proceedings before a tribunal engage the rights

guaranteed by section 7 or 11(d) of the *Canadian Charter of Rights and Freedoms.*[3] Otherwise, it is for the legislatures or Parliament, as the case may be, to determine the composition, structure, and degree of independence of administrative tribunals.

[52] To be clear about the implications of this in relation to the question before us, I note that the Federation of Labour and two unions did not contend that proceedings before the Labour Relations Board engage the rights guaranteed by sections 7 and 11(d) of the *Charter*. Rather, they rested their argument on the unwritten constitutional principle of judicial independence grounded in the preamble to the *Constitution Act, 1867.* And they argued that this principle extended to members of administrative tribunals responsible for quasi-judicial decision-making of the kind required of the chairperson and vice-chairpersons of the Labour Relations Board.

[53] Their argument strikes me as highly problematic inasmuch as the Supreme Court rejected a similar argument in *Ocean Port.* Chief Justice McLachlin said this of the argument in that case:

> [29] …. The respondent does not argue that the proceedings before the Board engage a right to an independent tribunal under ss. 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*. Instead, it contends that the preamble to the *Constitution Act, 1867* mandates a minimum degree of independence for at least some administrative tribunals. In support, the respondent invokes Lamer C.J."s discussion of judicial independence in the *Provincial Court Judges Reference*. In that case, Lamer C.J., writing for the majority, concluded that "judicial independence is at root an <u>unwritten</u> constitutional principle ... recognized and

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[3] Section 7 guarantees the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice, while section 11 guarantees the right of a person charged with an offence to a fair and public hearing by an independent and impartial tribunal.

affirmed by the preamble to the *Constitution Act, 1867*" (para. 83 (emphasis in original)). The respondent argues that the same principle binds administrative tribunals exercising adjudicative functions. [emphasis in original]

[54] The Chief Justice then went on to dismiss this argument.

[30] With respect, I find no support for this proposition in the *Provincial Court Judges Reference*. The language and reasoning of the decision are confined to the superior and provincial courts. Lamer C.J. addressed the issue of *judicial* independence; that is, the independence of the courts of law comprising the judicial branch of government. Nowhere in his reasons does he extend his comments to tribunals other than courts of law.

[31] Nor does the rationale for locating a constitutional guarantee of independence in the preamble to the *Constitution Act, 1867* extend, as a matter of principle, to administrative tribunals. Lamer C.J.'s reasoning rests on the preamble's reference to a constitutional system "similar in Principle to that of the United Kingdom". Applied to the modern Canadian context, this guarantee extends to provincial courts (at para. 106):

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente, supra*, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However ... judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country.

These comments circumscribe the requirement of independence, as a constitutional imperative emanating from the preamble, to the provincial and superior courts. [underlining added throughout]

[55] Once again, these passages plainly contain expressions of principle of general application, as does the following passage:

[32] Lamer C.J. also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the I ndependence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive

> branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts. [emphasis added]

[56] Given what I regard as the clear import of these passages, I am of the view the argument of the Federation of Labour and the two unions is not only problematic but must fail. In other words, I am of the opinion that, in light of reasons for judgment in *Ocean Port*, the unwritten constitutional principle of judicial independence grounded in the preamble to the *Constitution Act, 1867* cannot be seen to extend to the Saskatchewan Labour Relations Board, including the chairperson and vice-chairpersons of the Board.

[57] In fairness to the position taken by the Federation of Labour and the two unions, I should say that they contended otherwise, urging upon us a less definitive interpretation of *Ocean Port*. In their submission, *Ocean Port* should not be seen to apply to all manner of administrative tribunals—not in itself and not in light of other decisions of the Supreme Court, including in particular the subsequent decisions of the Court in *Ell* v. *Alberta, supra* and *Bell Canada* v. *Canadian Telephone Employees Assn*., 2003 SCC 36, [2003] 1 S.C.R. 884.

[58] As for *Ocean Port* itself, so the submission goes, the decision should be understood in light of the fact the British Columbia Liquor Appeal Board was an administrative tribunal charged with regulating liquor licensing and functioned, as such, at the administrative end of the constitutional divide between the executive and the judicial branches of government, rather than at the judicial end, whereas the Labour Relations Board functions at or near the judicial end. While this is true, meaning that *Ocean Port* is distinguishable in

fact from the present case, the body of principle expounded in *Ocean Port* is, in my opinion, of general application and must be applied accordingly in keeping with the doctrine of *stare decisis*. So I cannot accept this submission, which is to say I cannot accept it even though I agree with the Federation of Labour and the two unions that the Labour Relations Board functions near the judicial end of the divide rather than the administrative end.

[59] As for the subsequent decisions of the Supreme Court in *Ell* and *Bell Canada*, the Federation of Labour and the two unions submitted that these decisions and others served to temper the rigour of *Ocean Port* and thus leave it open to the lower courts to extend the reach of the unwritten constitutional principle of judicial independence beyond the courts to a limited class of administrative tribunals, being those whose quasi-judicial adjudicative function places them at the judicial end of the constitutional divide rather than at the administrative end or somewhere in between. The submission was developed along the lines of the reasoning found in *McKenzie* v. *British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCSC 1372, 272 D.L.R. (4th) 455 (B.C.S.C.).

[60] With respect, I cannot subscribe to this submission. In *Ell* the Supreme Court held that the unwritten constitutional principle of judicial independence applies to the office of justice of the peace, given the judicial functions exercised by justices of the peace in enforcing the criminal law within the court system. I see nothing in the reasons for judgment of the Court to support the position advocated by the Federation of Labour and the two unions.

[61] Indeed, their position seems the weaker by reason of *Ell*. I say this because, as noted above in para. 42, the Supreme Court was at pains in *Ell* to more fully explain the basis upon which the constitutional principle of judicial independence rests, and the purposes it serves. Its explanation is grounded in the unique role of courts of law, especially in relation to the indispensible role of the courts in upholding the integrity of our constitutional order as the "guardian of the Constitution." And the explanation serves in full to reinforce the nature of the gulf between courts of law and administrative tribunals, even administrative tribunals whose legislated mandate places them near the judicial end of the constitutional divide between the legislative and executive branches of government, on the one hand, and the judicial branch on the other.

[62] Nor do I see anything in *Bell Canada* to support the position advocated by the Federation of Labour and the two unions. *Bell Canada* had to do with the degree of independence of the Canadian Human Rights Tribunal, given the terms of the enabling statute and the requirements of the common law principles of natural justice. The Supreme Court was invited to apply the unwritten constitutional principle of judicial independence to the Tribunal. It declined to do so, however, even though the function of the Tribunal was *exclusively adjudicative*, and even though the Tribunal was charged with the duty of adjudicating disputes in the field of *human rights*.

[63] Still, the Federation of Labour and the two unions submitted that the Court declined to do so for the reason it was unnecessary to do otherwise, with the Court having intimated that, had it been necessary to do otherwise, it may well have extended this constitutional principle to the Tribunal. Even if this

were so, I am of the view it would not allow for this Court to depart from *Ocean Port* in light of the doctrine of *stare decisis*.

[64] In conclusion, and for essentially the whole of these reasons, I must say I cannot agree with the position taken by the Federation of Labour and the two unions. In other words I am of the opinion *Ocean Port* is dispositive of the question under consideration and, therefore, dispositive of the appeal.

[65] Hence, I would dismiss the appeal. This makes it unnecessary, of course, to consider the contention of the Government that the application of the Federation of Labour and the two unions to have O.C. 98/2008 declared void, being the second application of its kind, should have been dismissed in the Court of Queen's Bench as an abuse of process. That said, and in accordance with the position taken by the Government in respect of costs, I would make no order for costs on appeal.

Dated this 11th day of June 2013.

"Cameron J.A."
Cameron J.A.

I concur:

"Caldwell J.A."
Caldwell J.A.

"Herauf J.A."
Herauf J.A.